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10/693,475

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Leonardo Jose Sanchez Aquino

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EXAMINER

PADEN, CAROLYN A

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The time period for reply, if any, is set in the attached communication.



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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/693,475  
Filing Date: October 24, 2003  
Appellant(s): AQUINO ET AL.

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Ellen Plotkin  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed December 3, 2007 appealing from the Office action mailed July 30, 2007.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

EP 0,757,895                      HERCULES                      12-1997

Fischer, J. 2001. Foodline Accession Number 559753 abstract from Food Ingredients and Analysis International (May-June) 23(3)29-31.

Schwartzberg, H. G. 1992. Physical Chemistry of Foods. Marcel-Dekker, Inc., New York, p. 264-265.

Lowe, B. 1937. Experimental Cookery. John Wiley & Sons, Inc., New York, p. 271.

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 3, 4 and 8-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hercules Inc (EP 0757895) in view of Fischer as further evidenced by Lowe and also Schwartzberg.

Hercules discloses low fat salad dressing made to contain a pectin derivative as a partial or complete fat substitute. The dressing formulation is shown at the example bridging columns 6 and 7, starting at line 37. In this case the pectin component is regarded as the fiber source. Casein and whey protein are selected proteins for the composition. The oil sources for use in the product are shown at column 5, lines 44-46. Up to 35% fat is disclosed for use at column 5, line 9. The pH of the emulsion is shown at column 2, line 58. The use of egg white is contemplated at column 5, line 17. Claim 1 appears to differ from Hercules in the recitation of the use of an insoluble fiber in the emulsion, in the recitation of the use of a viscosity building emulsifier. Fischer teaches the use of fruit fibers, such as Herbacel AQ, in foods. Herbacel AQ plus is disclosed as a source of plant cell wall materials or dietary fibers, such as cellulose, hemicellulose

and pectin. Applicant defines Herbacel AQ as a source of insoluble dietary fiber at page 7, lines 9-11 of the specification. Fischer discloses Herbacel AQ as useful in applications that include products where viscosity enhancement or thickening is acceptable. With the references of Hercules and Fischer before him, it would have been obvious to one of ordinary skill in the art to select Fischer's Herbacel as a pectin source for Hercules in order to provide a salad dressing with an enhanced viscosity. It would also have been obvious to utilize the pectin source of Fischer to enhance the nutritional quality of the salad dressing by providing a source of insoluble dietary fiber to the dressing. It is appreciated that the protein in Hercules is not described as being "viscosity-building" but no unobvious or unexpected result is seen from this feature because both whey and casein are defined as viscosity building emulsifiers in the specification. Further Lowe is relied upon to teach that casein is a well-known emulsifier for foods. Similarly egg white is also used as an emulsifier in foods. It is appreciated that HLB is not mentioned but an HLB of greater than about 8 is known in the art as defining oil in water emulsifier and Schwartzberg is relied upon to support this assertion. So the emulsifier would be an expected to have the HLB value of the claims. It is also appreciated that the oil droplet size of the

composition is not mentioned but the homogenization process would have been expected to provide an oil droplet size that is within the droplet size of the claims, particularly when a stable emulsion is formed. It is also appreciated that the settings from the homogenizer are not mentioned but to use one type of colloid mill over another would have been an obvious matter of choice with regard to the particular homogenizing apparatus that is available.

#### **(10) Response to Argument**

Appellant argues that there is no suggestion in Hercules to use the insoluble fibers of Fischer. Also, appellant argues that Fischer only discloses utility in ice cream and sorbets. This argument has been considered but is not persuasive. If one of ordinary skill in the art were looking to enhance the thickness of his salad dressing, it would have been obvious to look to an additive with viscosity enhancing properties. Fischer clearly teaches the application of his fiber "where viscosity enhancement or thickening is acceptable as a side effect of dietary fiber fortification." The fact that salad dressing was not mentioned in Fischer does not prohibit or teach away from a dietary fiber application to salad dressing. Appellant argues specific emulsifiers but applicants' emulsifiers are the same used in

Hercules. Appellant argues the amount of emulsifiers in the product but the caseinate protein used as the emulsifier is shown at column 6, line 41. In this example both LMA pectin and protein are used in the formulation.

Appellant argues that Lowe teaches that casein is used in water in oil emulsions and not for the oil in water emulsion of the claims. This argument has been considered but is not persuasive. First Lowe teaches that casein is useful for both of these types of emulsions and that egg white is also useful in creating oil in water emulsions. The dressing of Hercules is a low fat dressing so one of ordinary skill in the art would expect it to be oil in water emulsion. Appellant argues the taste and appearance of the product but no difference is seen between the taste and appearance of applicants' product and the taste and appearance of Hercules in view of Fischer.

Appellant argues the use of a high-pressure homogenizer. Most of the claims are product claims. The use of a homogenizer is not mentioned in these claims. In method claims 14, homogenization is described as an optional step so no criticality is attached to the use a particular homogenizer. In method claim 15 a particular homogenizer is utilized but homogenization remains an optional step. The homogenization process of



Hercules in a colloid mill would be expected to enhance the overall taste of the salad dressings.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Application/Control  
Number: 10/693,475  
Art Unit: 1794

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Respectfully submitted,

CAROLYN PADEN  
PRIMARY EXAMINER


1794



Carolyn Paden

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